# In the Supreme Court of the United States

**OCTOBER TERM 1944.**

**No. . . . . .**

THE OHIO PUBLIC SERVICE COMPANY,
*Petitioner,*

v.

THE NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### OPINIONS OF THE COURT BELOW.

The Circuit Court rendered no opinion. Its per curiam order is reported in 144 F. 2d. 252, and is set forth in the record page 475.

The Decision and Order of the National Labor Relations Board is reported in 52 N. L. R. B. 725, and is set forth in the record page 370.

The Intermediate Report of the trial examiner is set forth in the record, page 330.

### JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is set forth in the petition for writ of certiorari, *supra*, page 8.

### STATEMENT OF THE CASE.

A statement of so much of the case as is material to an understanding of the questions presented is set forth in the petition for writ of certiorari, *supra*, page 1. Some

additional facts will be stated in the argument and in the interest of brevity are not here set forth.

## ASSIGNED ERRORS TO BE URGED.

The assigned errors to be urged are set forth in the petition for writ of certiorari, under the heading of Questions Presented, *supra*, page 12.

## ARGUMENT.

### A. McCormick's statement to Thomas. Burger's statement to a group of employees.

In paragraph 6 (a) of the complaint (R. 5), filed March 4, 1943, it is alleged that petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act[1] by

> "making disparaging and derogatory statements to certain of its employees about and against a union affiliated with an outside union. This occurred on or about June 1, 1941, through one W. B. McCormick, superintendent of Respondent's Lorain power plant."

In support of this charge Ben F. Thomas testified that he was employed as a guard in February, 1941, and after one month's service was dismissed as being over age, but with the promise that other work would be found for him. (R. 61, 272.) Thomas then went to work for The National Tube Company, where he joined the C. I. O. (R. 62.) In June, 1941, McCormick sent for Thomas and reemployed him as storekeeper. (R. 63.) Thomas testified that at this time, June, 1941, McCormick made the statement, "I hope you don't belong to that God damned C. I. O."[2] (R. 62.)

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[1] "Sec. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Title 29, U. S. C. 157.

[2] McCormick testified that he remembered no such conversation but that he might have made the statement. (R. 273, 274.)

Thomas replied that he did. Thomas was nevertheless employed. No evidence was offered to show that any other employee learned or knew of this alleged conversation or that it was at any time repeated by McCormick or Thomas. The trial examiner found that by this naked remark petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act. (R. 334, 339, 340.) Respondent adopted such findings. (R. 371.)

Following the filing of the charge by the C. I. O. on February 9, 1943 (R. 1), Mr. Heilman, field representative, telephoned E. J. Burger, petitioner's vice president and manager of the Lorain Division, requesting an interview to discuss a grievance of employee Witte. Mr. Burger then arranged for a conference with several employees, including Witte, and at this conference said (R. 257):

> "I said that I had been approached from the outside by a person who wanted to represent one of our employees with respect to a grievance. I was very much surprised to have that happen because I felt that every employee of the company knew of the policy of the company that any employee could talk to any of his superiors without retribution or punishment and, if there was anything wrong, I felt that it was to our general, mutual benefit to discuss the matter and try to get whatever matters might be wrong cleared up."

While no charge is found in the complaint, based on such remarks (R. 3), and while the complaint was amended so as to conform to the proof with respect to dates, names and inconsequential matters but not so as to add another unfair labor charge (R. 313), and while the trial examiner in his intermediate report (R. 330) made no finding in regard thereto, respondent nevertheless found that the foregoing naked statements of Mr. Burger were designed to discourage the employees in their union membership and

activities and were in violation of Section 8 (1) of the Act.[1] (R. 371, 372.)

It is interesting to observe that Mr. Witte spoke up following Mr. Burger's remarks, saying that he did not ask Mr. Heilman to represent him but merely enumerated some of the things which he, Witte, thought were wrong with his job. Mr. Burger asked Mr. Witte to explain what might be wrong with his job and why he might have grievances, and Mr. Witte complained that he had been assigned to jobs outside of what he considered his regular routine. (R. 257, 258.) It was this complaint of Witte that was made the basis of the charge found in paragraph 6 (c) of the complaint (R. 5) on which the trial examiner made no finding, and which the respondent found did not constitute discriminatory treatment and was not violative of Section 8 (1) of the Act. (R. 372.)

In neither the statement of McCormick to Thomas or the statement of Burger to the employees was there any threat of any kind. Nowhere in the statements or in any of the surrounding circumstances do we find, or did respondent point to, any evidence of interference or coercion or restraint. *National Labor Relations Board v. Virginia Electric & Power Company*, (1941) 314 U. S. 469.

The most that can be said is that McCormick voiced perhaps a violent dislike for the C. I. O. and would prefer that employees did not join. But that it made no difference to employment if the employees did join is shown by the fact that Thomas was given the job. Certainly the most that can be said of Burger's statements, considering that they were made following Heilman's telephone call, and the worst construction that can be placed thereon for the petitioner, is that they expressed a preference, to-wit, that the employees discuss their grievances freely with

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[1] "Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

their superiors, rather than to bring in some outsider to speak for them. But the mere expression of a preference does not constitute an unlawful interference. As was said by the court in *Diamond T Motor Car Company v. National Labor Relations Board* (C. C. A. 7th, 1941), 119 F. 2d. 978, 982:

> "Even if it be deemed an expression of a preference as between labor organizations, we still think, as we did in *Jefferson Electric Company v. N. L. R. B.*, 7 Cir., 102 F. 2d 949, and *Foote Brothers Gear & Machine Corporation v. N. L. R. B.*, 7 Cir., 114 F. 2d 611, that a mere showing of preference does not constitute unlawful interference with an employee in the exercise of his rights under the Act. It is only when such asserted preference, with all surrounding facts and circumstances, amounts to improper influence and approaches a coercive character that it is to be condemned."

Any inference that undue pressure was placed upon or attempted to be placed upon Thomas by McCormick, or by Burger on Witte, is certainly not borne out by the conduct of the men. Thomas was employed notwithstanding he was a member of the C. I. O. Witte's complaint was found to be groundless by the respondent. (R. 372, paragraph 3.)

### B. McCormick's statement to Yingling.

In paragraph 6 (b) of the complaint (R. 5) it is alleged that petitioner violated Section 7 of the Act, by

> "making statements to certain of its employees, that if its employees joined or formed a union the company would change the method of compensation, eliminate vacation and sick leave pay and cancel life insurance it carries for its employees. This occurred on or about July, 1942, through one W. B. McCormick, superintendent of Respondent's Lorain power plant."

In support of this charge Cornelius L. Yingling testified that in July or August, 1942, various employees received a letter from the I. B. E. W.[1] about getting into the Union and that he asked McCormick, the plant superintendent, what he thought about it. (R. 26.) When McCormick replied that he "could not tell the boys what to do, that he had to keep quiet on that" (R. 26), Yingling continued to talk about it (R. 53), whereupon McCormick allegedly said, "if they do get a union in here, there would be no doubt but what the Company, the first thing, would do, would take men off of salary and put them on an hourly basis; do away with their sick leave, and would no doubt do away with the insurance policy that the Company holds for the employees." (R. 26, 27.) Yingling understood this to be McCormick's personal opinion—not an official opinion. (R. 53.) McCormick admitted that he told Yingling he couldn't talk about unions but denied that he made the further statements attributed to him by Yingling. (R. 286.) No evidence was offered that any employee other than Yingling knew of this alleged conversation, or that it was at any time repeated by McCormick or Yingling to any other person. Respondent found that the conversation took place as alleged and that it was violative of Section 8 (1) of the Act. (R. 371.)

There can be no question but what, if this alleged statement of McCormick to Yingling had not been prefaced as it was by the statement that McCormick "could not tell the boys what to do, that he had to keep quiet on that," and if the statement had not been made and understood by Yingling to be the expression of McCormick's personal opinion rather than an official opinion, it would fall within the category of the statements condemned by this Court in

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[1] The record discloses no other organizational activities by the International Brotherhood of Electrical Workers (A. F. of L.) except the receipt of the letter referred to.

the case of *National Labor Relations Board v. Virginia Electric & Power Company, supra.* But being prefaced as it was, and having been made only after Yingling pressed for the expression of a personal opinion, it is difficult to understand upon what basis it can be found to be an expression of petitioner's labor policy or intended acts if a union was organized among its employees at the Lorain Ohio power plant. While it is axiomatic that an employer is charged with the statements or acts of his servants, both authorized and unauthorized, if done or made in the course and scope of his employment, it is equally axiomatic that an employer is not to be charged with the acts or statements of his employees known to be unauthorized or known to be outside or beyond the course and scope of his employment. Certainly the expression of a personal opinion, understood to be personal, is not authorized by the employer and is outside and beyond the course and scope of an employee's employment, and is not binding on the employer. Yingling, having understood that the statement was a personal opinion, could not honestly consider, act upon or publish the statement as one which set forth petitioner's intended or contemplated actions or labor policy in event a labor union was formed. That Yingling realized this is shown by his statement that it did not affect him in his "choice." (R. 53.) And if Yingling, the only employee to whom the statement was made or known, could not honestly act thereon as a statement of petitioner's labor policy or intended actions, then how can petitioner be honestly held responsible therefor?

Respondent in its Decision and Order found that (R. 371):

> "notwithstanding Yingling's testimony that he understood McCormick's statement to have been an expression of a personal, and not an official, opinion, and that McCormick's remark did not affect him in his 'choice,' such statement, in view of its nature and the authority

of the person making it, was violative of Section 8 (1) of the Act."

But obviously it was apparent that McCormick had no authority from petitioner to make the statement when Yingling, the only person to whom it was made, knew the statement reflected McCormick's personal opinion.

### C. The Discharges of Yingling and Thomas.

#### 1. Yingling was discharged for cause.

Cornelius L. Yingling started working for petitioner on December 17, 1934. (R. 25.) He was a satisfactory worker and was promoted from time to time. (R. 291.) In the middle of December, 1942, however, he inquired if McCormick would give him a release to take a job at the City water works. (R. 290.) Thereafter he was listless in his job, didn't take care of wiping out the oil, etc., on the auxiliary turbines (R. 291) and, although he was spoken to a couple of times about it (R. 291) his attitude did not change. (R. 292.) When he inquired about the release McCormick told him he could have it if he was going to better himself and told Yingling to think it over. (R. 290, 303.) In January, 1943, Yingling told McCormick he "didn't believe that he wanted" the job at the water works (R. 291), and while he indicated thereby that he had given up the idea of switching jobs he did not convince McCormick that he was not going to take the job at the water works (R. 291) and McCormick's conclusions were that Yingling was not sure of himself. (R. 304.)

Contrary to the finding of the trial examiner (R. 340), affirmed by respondent (R. 371), there had been no understanding between the District Manager of the petitioner and the superintendent of the water works that neither would offer employment to an employee of the other without first conferring with such other, nor is there any evidence of any kind in the record to support a finding that such an understanding existed.

On Saturday, January 23, 1943, Yingling's father-in-law, a Mr. Ashbolt, who died during the course of the trial (R. 189), telephoned McCormick around one o'clock and advised that he was having a party at his house that night and he would like to have Yingling come out and help him. (R. 287). McCormick excused Yingling from coming to work that night, Yingling being scheduled to work on the 11:00 P. M. shift. (R. 287.) Later in the same afternoon, around 2:30 o'clock, Yingling himself called (R. 287), referred to the telephone call of his father-in-law, and stated that he could make his own arrangements. (R. 287, 288.) McCormick advised him that he was working the last shift; that certainly the party was not going to last all night, and inquired if he intended to get drunk. (R. 288.) When Yingling replied that he did not intend to get drunk McCormick inquired as to why he couldn't report for work around 1:00 A. M. Sunday, to which Yingling replied that he would. (R. 288.) Around 9:00 or 9:30 petitioner's office manager, Mr. Copeland, who was attending the party at Ashbolt's, at the request of Yingling, called McCormick from Ashbolt's house (R. 211, 288) and advised that Yingling was not in any condition to come to work (R. 211, 289), to which McCormick replied "Go on," or something like that. (R. 289.) Mr. Copeland then said, "I'm telling you he isn't going to be there," to which McCormick replied, "If he isn't going to be there, he isn't going to be there, is he?" or words to that effect. (R. 289.) McCormick still expected Yingling and made no arrangements for a relief man. When Yingling failed to report at one o'clock, McCormick had to work in Yingling's place until seven o'clock Sunday morning. (R. 289.) Yingling's failure to report for work, plus the fact that he was not tending to his business since the time he had asked for a release to take a job at the water works, prompted McCormick to decide on that Saturday night, January 23rd, to discharge Yingling. (R. 292.) He had a man to take Yingling's place,

Charles Staron, but he did not know who he was going to put in Staron's place. (R. 292.) Riser, a guard, wanted to work in the power plant but there was a question about his eyes and it wasn't until February 8th that McCormick was satisfied that Riser's eyes were no impediment to the job he was to do in the plant and he consequently discharged Yingling on that day, put Staron[1] in Yingling's place and Riser in Staron's place. When McCormick made this change he did not know that there was any movement on foot for a labor organization in the plant and did not know that Yingling, or his successor, Staron, were supposed to be officers of the Union. (R. 271, 293.) In fact his first knowledge of any Union activities was obtained from his wife on the afternoon of the following day, February 9th. (R. 270.) When he returned home from work his wife told him that she had learned about the Union when she was in town that day talking to Mrs. Greenup, the wife of one of the engineers in the plant. (R. 270.) The next day, February 10th, he read in the Lorain evening newspaper about the charges (R. 1) which were filed in this case on February 9th. (R. 271.)

How the trial examiner, in face of this record, could conclude that Yingling was discharged because of his activities on behalf of the Union or that McCormick knew on February 8th of Yingling's activities on behalf of the Union is beyond comprehension. Furthermore, McCormick's decision to discharge Yingling was arrived at when he failed to appear for work on January 23rd, a full week, as it now develops, before any attempts were made by anybody to organize a union in the power plant at Lorain.

We respectfully submit that an employee is justifiably discharged when he asks to be excused to attend a party, promises not to get drunk and to report for work at 1:00

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[1] Staron, as it turned out, was a member of the Union. He was elected its treasurer on February 6th. (R. 56.)

A. M., and then allows himself to get into such condition that he can't report for work and fails to show up.

**2. Thomas was discharged for cause.**

Ben F. Thomas first entered petitioner's employ in February, 1941, as a guard. (R. 60, 61, 272.) Because of certain rules of petitioner respecting guards he was laid off at the end of February, 1941, and took a job with The National Tube Company. (R. 61.) In June, 1941, he was reemployed by the petitioner in the capacity of storekeeper. (R. 61, 273.)

Thomas had been a clerk in a grocery store and a drug store. (R. 147.) For seven years he was Clerk of the Municipal Court of Lorain, Ohio. (R. 147.) In the first World War he was an operator of a canteen in the Navy, keeping track of supplies after they had been received. (R. 154.) He was therefore accustomed to the keeping of records. (R. 147.) Petitioner's former storekeeper, Charles Staron, broke him in on his job in June, 1941, by staying with him in the storeroom for approximately three weeks. (R. 154, 159, 273.) Staron has ever since remained an employee of petitioner and was available to Thomas if any question came up in the performance of his duties as storekeeper.

Thomas' duties required that he receive all materials and supplies delivered at the plant. Before receipting therefor he was to make certain that he was receiving the boxes, packages, pieces and weights called for in the shipping notice and compare them with the purchase order. If there were any discrepancies or any damaged articles delivered he was to note that fact, and in the event of damaged articles was to have the truck driver note that fact in the shipping notice. The purchase order forms used by petitioner (Exhibit 4, R. 421, Offered and Received, R. 127) had these instructions printed thereon at the bottom there-

of, adjacent to the place provided for Thomas' signature. (R. 158.)

In addition Thomas was required to keep a record of the safety goggles issued to the men and of the safety shoes purchased by the men. (R. 92, 93, 276 to 279.) Petitioner contributes $1.50 to each employee who purchases and wears safety shoes and for this purpose and other incidental purposes Thomas had a petty cash account. (R. 92, 276 to 278.)

In September, 1941, about three months after Thomas was employed, a truck of The George Worthington Company appeared at the gate to deliver a shipment of cable clamps and flashlight batteries. (R. 71, 123 to 125; see Exhibits 31 and 32, R. 463, Offered and Received, R. 127.) It was about 4:30 o'clock in the afternoon but Thomas was still in the storeroom. The guard called Thomas, who requested that the truck driver come down to the storeroom. (R. 124.) Apparently the truck driver refused to do so and left one box with the guard at the gate, who signed a shipping notice acknowledging receipt of two boxes, and the truck driver left. As Thomas left for the day he inspected the box left with the guard and found that the shipment contained no flashlight batteries and that the order was two cable clamps short. (R. 71.) In view of the receipt given by the guard to the truck driver petitioner had to pay for the two missing cable clamps and the flashlight batteries. (R. 71.) As a result of this, written notice (Exhibit 15, R. 437, Offered and Received, R. 127) was given both to Thomas and the guards and posted on the bulletin board, as follows:

> "Notice to Watchmen and to Everyone Concerned:
>
> "Recently we got into trouble when a Watchman signed for a truck shipment and the material was not there that he signed for.
>
> "In no case, during working hours, is the Watchman to receive any freight or express shipments. How-

ever, if the Watchman, after working hours, believes that the truck man has a legitimate excuse for not getting here during working hours, he can receive material but in doing so he must be sure that he receives the article or articles which the bill calls for.

"Be sure also that the packages or any other material is in good condition. If the packages, boxes or material is broken or damaged, see that the truck driver makes a written note of this on the slip, with his signature, before you sign.

"Please check and double check this."

This incident is referred to by the trial examiner as "the third matter for which Thomas was criticized." (R. 346, 347.) The trial examiner apparently misunderstood the purpose of this testimony. The testimony was offered to show that within a rather short time after Thomas' employment, to-wit, three and one-half months, Thomas in addition to the instructions given him when first employed, was put upon definite notice as to what was expected of him as a storekeeper.

In December, 1941, three months later, a shipment of castings was received by Thomas from The Lorain Casting Company. (R. 94 to 98; Exhibits 1, 2, 3(a) and 3(b), R. 415 to 419, Offered and Received, R. 127.) He receipted for 360 pounds of castings, which at 8.6 cents per pound would make an estimated cost of $30.96. Actually there were 560 pounds of castings received. There was a difference of 200 pounds on 14 castings. (R. 94 to 98.) Thomas admits that he did not weigh the castings, first stating that he could not weigh them as they could not all be piled on the scales at one time. (R. 97.) He then admitted that they could have been weighed by weighing one casting, multiplying its weight by the number of castings, and thereby determine the total poundage and the purchase price. (R. 116, 117.) He paid the truck driver for hauling based upon the weight set forth in the shipping notice and not the actual weight. (R. 97, 98, 133.) He admitted that castings are paid for

by the pound and that therefore the weight is a very important item to both the manufacturer and petitioner. (R. 117, 118.) Yet he admitted that he did not weigh the castings.

Three months later, in March, 1942, he received a shipment from the Hartman Spring Company of two reels of 250 feet each of superservice cord. (Exhibits 22 to 30, R. 451 to 461, offered and received, R. 127.) The purchase order called for but one reel and he reported only one reel received. While at first he maintained that he received but one reel (R. 118, 119), he later admitted that he received two reels. (R. 122, 457.)

On December 26, 1942, the day after Christmas, The Air Reduction Sales Company delivered two tanks of oxygen. (Exhibits 16 to 21; R. 439 to 449, Offered and Received, R. 127.) Thomas testified that it was lunch time and he was on his way to lunch (R. 72), and while he at first maintained that when he signed the shipping notice it called for two tanks of oxygen containing 488 cubic feet (R. 108), *that he filed it in his drawer* (R. 110), and *that the driver never had the receipt after Thomas had signed it* (R. 111), he later admitted that when he signed the receipt the driver of the truck *did not give him a copy of it because the driver did not have it completed* (R. 111), that he, Thomas, *left the signed receipt* bearing the numbers of two tanks *with the driver, who during Thomas' absence at lunch filled it in for three tanks, and that Thomas did not get a copy of it until after he came back from lunch.* (R. 113.) While on direct examination, and again on rebuttal, he testified, and the trial examiner found (R. 348), that he did not know there was anything wrong concerning this shipment until he received an invoice from the Cleveland office for three tanks of oxygen on January 30, 1943, he admitted on cross examination that, *on the day of delivery,* when he returned from lunch and got the copy of the shipping memorandum left by the driver *he discovered*

(R. 113) that the driver had written in on the memorandum "three tanks of oxygen containing 244 cubic feet each," or a total of 732 cubic feet. (R. 111, 112.) On cross examination he further testified that

> "If I am not mistaken, I talked to Mr. McCormick about this and told him that the extension was wrong *at the time.*" (R. 115.)

He could not recall what McCormick said to him but McCormick told him to get the thing straightened out (R. 279), and yet Thomas admits that he did nothing from December 26th, when he discovered the mistake and was told by McCormick to straighten it out, until January 30, 1943, more than a month later, when he said he would take it up with the truck driver of The Air Reduction Sales Company on February 6th. (Exhibit 20; R. 447, Offered and Received, R. 127.) The finding of the trial examiner that it was "obvious" that Thomas proceeded "expeditiously" and that there could be no "merit" in petitioner's criticism of this transaction (R. 348) is wholly contrary to the testimony of Thomas himself and is without foundation in the record.

The trial examiner found (R. 348, 349):

> "While Thomas was technically in error for not scrutinizing the shipping memo more carefully, it is readily understandable that he should have stopped after checking the cylinder numbers as listed."

But is it understandable that a storekeeper signs a shipping invoice *partially made out*, leaves it with the truck driver to completely fill out in the storekeeper's absence? What would have prevented the truck driver from writing in ten or more tanks instead of three when in fact only two were received? Is it understandable that a storekeeper should say, "What the truck driver put on there after I signed it was nothing concerning me"? (R. 110.)

On January 2, 1943, The Norwalk Trucking Company delivered a shipment of castings from The Klotz Machine

Company, some of which were sacked and some of which were open. (R. 102; Exhibits 4 to 14, R. 421 to 436, Offered and Received, R. 127, 298.) Again Thomas seeks to excuse himself by saying it was lunch time (R. 103) and that the truck driver had a number of deliveries to make that afternoon and was anxious to go to lunch (R. 135), so he did not count or weigh the castings. (R. 105.) He receipted for 215 castings when in fact there were only 213. He made no notation, nor did he have the truck driver note, the fact that two of the 213 castings were broken. (R. 67, 102, 103, 104, 117, 118.) After lunch he counted the castings and found that two were missing. (R. 104.) He reported this shortage to McCormick on the same afternoon, January 2, 1943. (R. 68.) Again, he was unable to recollect anything that McCormick said. (R. 70.) McCormick told him to get in touch with The Norwalk Truck Company, which has an office in Lorain, and get the shortage straightened out. (R. 282.) Although this was on January 2, 1943, Thomas did nothing for three weeks. On January 22nd he contacted the trucking company and asked them to look into it. (R. 70.) He testified that he does not know what happened concerning this shortage as he was fired on February 8th. (R. 70.)

In November or December, 1942, it was discovered that Thomas' records with respect to safety shoes and safety goggles were not up to date (R. 92, 93); that a meeting of foremen was called in McCormick's office, with Thomas, for the purpose of getting the records straightened out. (R. 277 to 279.) While Thomas at first denied responsibility for keeping these records (R. 92, 93), he finally admitted that it was his responsibility and that he had to make up a complete new record in the fore part of January, 1943, based upon information obtained at the meeting with the foremen and on information subsequently obtained by the foremen from the men. (R. 141, 142.)

On Saturday, February 6, 1943, Thomas reported off ill. (R. 91.) He was not, however, too ill to attend the Union meeting on that evening held at Yingling's home. (R. 91.) A Mr. Lenhart was placed in the storeroom on February 6th and he found on Thomas' desk a memorandum (Exhibit 33; R. 465), on the back of which was written, "See Air Reduction about this today, 2/6/43." (R. 198.) Not knowing what this memorandum meant, he took it to McCormick, who instructed Lenhart to take the matter up with the driver of The Air Reduction Sales Company when he called at the plant that day, which Mr. Lenhart did. (R. 199.) The truck driver was surprised to be advised that they were charged with three tanks of oxygen when they claimed only two tanks were received and said he would take it up with his office and straighten it out. (R. 199.) McCormick was surprised to find out that this matter, hanging fire since December 26, 1942, had not yet been straightened out (R. 281), and investigated to find out whether Thomas had taken care of the shortage of two castings and the two broken castings which had been received from The Norwalk Trucking Company on January 2, 1943. He learned that this matter had not yet been taken care of. (R. 283.) Whereupon, in view of the errors which Thomas had made, his failure to keep the records of the safety shoes and safety goggles as they should have been kept, and his failure to straighten out by February 6th the two shipments, one received on December 26, 1942, and the other on January 2, 1943, McCormick decided on Saturday, February 6th, to discharge Thomas and discharged him on Monday, February 8th.

Here we have the case of a storekeeper who failed from June 1, 1941, to December, 1942, to keep the required records of the issuance of safety goggles and safety shoes; who had to compile such records when his neglect was discovered, by interviewing each man in the plant.

A storekeeper who recognizes that castings are bought and sold and transportation charges paid according to weight, and yet, though a scale is provided therefor does not weigh them for the protection of his employer. A storekeeper who pays transportation charges and reports weights received and prices to be paid based on the shipper's notation of weights.

A storekeeper who, in his haste to go to lunch, signs for material and supplies received without counting the pieces or noting damaged articles.

A storekeeper who signs a partially filled out shipping receipt and dashes off to lunch, leaving the shipping receipt with the truck driver to be filled out, charging his employer with whatever the truck driver sees fit to write in, irrespective of deliveries, and *who is not concerned with what the truck driver writes on such receipt after he, the storekeeper, has signed it*; who does nothing for over a month to correct an error made under such circumstances, though it is immediately discovered and he is told to straighten it out and the truck driver was at the store at least once each week, usually on Saturdays.

This is the storekeeper who, the respondent says, was discharged without cause and must be put back to work.

### 3. Yingling and Thomas were not discharged for their union activities.

In order to maintain the charge made in paragraph 7 of the bill of complaint (R. 7), to-wit, that Yingling and Thomas were discharged on February 8, 1943, because they were members of and officers in the Union and active on behalf of the Union, it was necessary for respondent to establish that on February 8, 1943, petitioner knew that Yingling and Thomas were members of and officers in and active on behalf of the Union and that because thereof they were discharged. Otherwise the charge must fall.

At the hearing and in an endeavor to show that petitioner had knowledge of the organizational efforts that began on January 30, 1943 (R. 30) and knowledge of the fact that Yingling and Thomas were elected officers of the Union, on February 6th, 1943 (R. 33), respondent was permitted to show, over objection (R. 78), that shortly after Thomas was employed as a storekeeper in June, 1941, he had a conversation with a fellow employee, Harry Nelson, concerning another employee, Steve Does. According to Thomas, Nelson told him, "Don't tell Steve Does anything you don't want Mr. McCormick to know." (R. 88.) Over objection, Yingling was permitted to testify that Does worked frequently for McCormick at McCormick's home, doing odd jobs like painting. (R. 48.) Respondent's witnesses Thomas, Witte and Heilman, over objection, were permitted to testify that at the Union meeting on the night of February 6th the general opinion of the men present was that they did not want Does in the Union for the simple reason that nothing would be secret from there on out. (R. 89, 161, 185.) Respondent's witness Heilman, Union organizer, was permitted to testify that at the meeting held at Yingling's home on the night of February 6th he told the men present that it would be impossible for them to keep their Union quiet any longer and that they might as well go after everybody, whereupon some one whom Heilman was unable to identify inquired, "Even Does, the stool pigeon?" to which Heilman replied, "I don't care; go after all of them." (R. 186.)

The purpose of the foregoing testimony was to show that Does, who was invited to join the Union on Sunday, February 7th, by witness Witte (R. 162), must have told McCormick, the plant superintendent, although no evidence of any kind was offered that Does actually did carry any tales of any kind. (R. 322.) No evidence of any kind was given to show that the employees were at all justified in their suspicions of Does or upon what such suspicions were

based. The alleged statement of Nelson to Thomas in June, 1941, was not repeated by Thomas to anyone so far as the record discloses.

The foregoing evidence was, we submit, clearly inadmissible, particularly in view of the fact that Harry Nelson, who made the alleged statement to Thomas, had left the petitioner's employ in October, 1942, and at the time of trial was represented by respondent's counsel as being in the army. (R. 81.)

Petitioner located Harry Nelson and procured his affidavit on September 25, 1943, and filed a motion with respondent to reopen the record and permit the testimony of Harry Nelson to be taken. (R. 384.) In this affidavit (R. 386) Nelson denied ever having made the statement attributed to him by Thomas, and said that such testimony on the part of Thomas was wholly false and untrue and that no such conversation ever took place. His affidavit further set forth the fact that when he left the employ of the petitioner in Lorain on October 24, 1942, he went to work for The Warren City Tank & Boiler Company in Warren, Ohio, where he was working at the time of giving his affidavit, and that he had never been in the army. (R. 386.)

Respondent denied petitioner's motion to reopen the record and take the testimony of Harry Nelson, saying that in its findings and conclusions it did not rely upon Mr. Does' alleged reputation as a "tale bearer" and that its conclusions regarding petitioner's knowledge of the union activities of Yingling and Thomas were adequately supported independently of Does' knowledge of Yingling's and Thomas' union affiliations and that its conclusions would in no way be affected by the testimony of Mr. Nelson. (R. 388, 389.)

Let us examine respondent's conclusions upon the question of petitioner's knowledge of the union activities of Yingling and Thomas.

At the outset respondent discredits the testimony of McCormick that he knew nothing of the organizational activities of the employees until his wife told him thereof on February 9th. (R. 270.) Respondent discredits the testimony of E. J. Burger to the effect that he first learned of such activities on February 9th. Mr. Burger was attending a directors' meeting in Cleveland and while there received a telegram from respondent concerning the charge filed that day (R. 1) by the Utility Workers Organizing Committee. (R. 250.) Throughout respondent's Decision and Order, as well as in the intermediate report of the trial examiner, respondent credits its own witnesses Yingling and Thomas and discredits the witnesses of petitioner. While every trier of fact—be it court, jury or administrative body—is the judge of the weight and credibility of the testimony of each and every witness, such judgment cannot be arbitrarily exercised. There must be some substantial foundation to a finding of non-credibility.

Yingling testified that when he pressed McCormick for a personal opinion on the letter of the I. B. E. W., McCormick said that if a union was organized the company would undoubtedly dispense with its guaranteed bi-weekly salary method of pay and substitute hourly rates, and would eliminate sick benefits, vacation pay and life insurance. (R. 26, 27.) McCormick denied that he made any such statement (R. 286) and testified that—

> "I told him that he knew I couldn't talk to him about unions and neither could I advise him. I told him 'You know the troubles that went on in Warren and all.' " (R. 286.)

Yingling and McCormick knew that the employees in the Warren power plant had formed a union. (R. 50.) They knew that the employees in the distribution department in Sandusky had affiliated with the I. B. E. W. (R. 50.) While Yingling denied it (R. 50), McCormick knew that these employees had not been deprived of their guaranteed sal-

aries, sick leave, vacation pay or insurance. Why then should McCormick make the statement attributed to him by Yingling?

Thomas said that when he was employed McCormick said to him, "I hope you don't belong to that God damned C. I. O.?" (R. 62.) If McCormick was inclined to lie or conceal the truth he would have denied such statement. McCormick testified (R. 274):

> "Well, it wasn't until after I hired him, probably, or was talking to him about the job. I might have said it. I don't know."

McCormick knew that Thomas had worked for the National Tube Company and everyone knew that the Tube Company had a C. I. O. closed shop and consequently that Thomas was a member of the union. Why then should he make such a statement? What are the probabilities?

No one can read the testimony of Thomas without concluding that he was a very evasive witness to say the least. When asked if he weighed castings received he said he could not pile them all on the scale at one time. (R. 97.) He admitted that they could be weighed by weighing one and multiplying its weight by the number of like castings to obtain the total weight. (R. 116, 117.) And finally he admitted he did not weigh them. When first inquired of with respect to the two reels of superservice cord received from Hartman Spring Company, he testified that there were two shipments, that he receipted for one reel and sent the purchase order to Cleveland and consequently did not have the purchase order to note receipt of the second reel when it came in. (R. 118 to 121.) When confronted with his memo of April 9, 1942, he admitted he received two reels and only noted the receipt of one. (R. 122.) Concerning the two tanks of oxygen received in *December, 1942*, Thomas at first maintained that he receipted for only 488 cubic feet (R. 108); that he filed the receipt in his drawer (R. 110), and that the truck driver never had the receipt after

he, Thomas, had signed it. (R. 111.) Later he admitted that the receipt was not filled out when he signed it and that he left it with the truck driver while he, Thomas, went to lunch, and when he returned he observed that the driver had filled in 732 cubic feet when only 488 cubic feet were delivered. This happened December 26, 1942. Yet on January 30, 1943, Thomas wrote the Cleveland office (Exhibit 20, R. 447):

> "Please see that this memo goes to the right person.
>
> "Looking at my duplicate copy of delivery slip it shows delivery of two tanks of oxygen.
>
> "Cylinder numbers, 66005 & 277691.
>
> "The oxygen cylinders contain 244 cu. ft. each so I don't see where they could possibly claim that we received 732 cu. ft. If they demand payment of this statement as it stands, please wait until I talk with their driver who made delivery, which will be Saturday 2-6-43."

Again in January, 1943, Thomas receipted for 215 castings when only 213 were delivered and two of the 213 were broken, as to which he made no notation on the shipping memo. He tried to excuse this conduct by saying that it was lunch hour and he went out to lunch (R. 103) and the truck driver was anxious to get to lunch. (R. 135.) When inquired of as to whether he had received any instructions as to how and when to sign for shipments he answered, "I never received any instructions." (R. 104.) He was then confronted with Exhibit 15, dated October 21, 1941 (R. 437), and asked, "But were you instructed definitely to sign for all materials, count and weigh them?" to which he answered, "Well, possibly—I have to think back a little bit—" (R. 105). And the next question, "But whenever you signed for materials you were supposed to examine them and compare them with the purchase order and your requisition, were you not?" to which he answered, "That's right." (R. 105.) And when finally he was made to admit that there were two castings short and two broken

and no notation made on any of the shipping documents, he answered, "That's right. It wasn't unusual to get broken castings, though" (R. 106), and then finally admitted that even though they were broken that did not excuse him for not noting the fact on the shipping documents. (R. 107.) While he admitted that he discovered that two castings were missing and two were broken when he returned from lunch on the day these shipments were delivered, to-wit, January 2, 1943, on January 11, 1943, he wrote a memo to the Cleveland office as follows (Exhibit 11, R. 435):

> "We counted these castings four times just because there was a difference in our count and that of the Norwalk Truck Co. They show 215 pcs. while we could count only 213 pcs. We will check with Norwalk Truck and see if they mislaid these castings."

There are no such inconsistencies in the testimony of petitioner's witnesses. On what basis then can respondent give credit to the testimony of Yingling and Thomas and discredit the testimony of petitioner's witnesses?

In its Decision and Order respondent sets forth certain circumstances which in its opinion evidence a discriminatory motive for the discharge of Yingling and Thomas. (R. 376, 377.) Respondent also sets forth certain other facts (R. 377, 378) which, together with the circumstances showing a discriminatory motive, fixes in the mind of the respondent the fact that at the time of such discharges petitioner knew of the union activities of Yingling and Thomas. However, only two of the circumstances and facts alluded to can be said to be anything more than the basis of an inference. The fact and circumstance that Yingling initiated the union discussions and was the most active employee on behalf of the union; the fact that Thomas signed his union card at the plant; the fact that the employees at the plant were small in number and that the

superintendent was in constant touch with them and worked with them all day Sunday, February 7th, the day following the election of Yingling and Thomas as officers in the union; the circumstance that in the opinion of respondent the reasons assigned for Yingling's and Thomas' discharge were inadequate; that discharges were rare; the circumstance that Yingling had been employed by petitioner for many years and had been regarded as a competent worker and had received promotions; the fact that neither Yingling nor Thomas had ever been reprimanded for his work or disciplined, or threatened with discharge or other form of discipline (assuming such to be true), the circumstance of petitioner's hostility toward the unionization of its employees (of which there is no proof in the record), can neither one nor all of them form the basis of an inference that because thereof petitioner had any knowledge of the union activities of Yingling and Thomas or any other employee.

The fact that for approximately one week prior to their discharge there were discussions at the plant, both during and after working hours, among the employees, concerning the formation of and membership in the union, might be claimed to be the basis of an inference that petitioner learned of these activities. Respondent footnotes this fact by saying that there was some general testimony indicating that the employees who engaged in organizational efforts attempted to conceal their activities from petitioner as well as from a few employees whom they did not trust. Respondent further says, however, that there was no credible detailed evidence in support of such general testimony, nor was there any evidence that the other employees had in fact no knowledge of the Union's formation, but that on the contrary there was the testimony of Yingling, which they credit, that the word drifted around and everybody was talking about it. It seems strange that respondent should pick out this one statement of Yingling and over-

look entirely his answers to the following questions of the trial examiner (R. 59):

> "Q. You stated that your conversations among the employees about the Union were partly in the powerhouse, partly around the powerhouse, and partly at your home. Can you roughly divide that up so that we can get some idea as to how much of this soliciting for Union interests took place at your home, how much in the vicinity of the powerhouse, and how much at the powerhouse?
>
> A. Oh, I would say roughly 75 per cent of it took place at my home.
>
> Q. And the rest of it at or around the powerhouse; is that correct?
>
> A. That's correct.
>
> Q. Was any portion of it done during working hours?
>
> A. No, sir.
>
> Q. No part of it at all during working hours?
>
> A. No, sir."

The witness Thomas testified (R. 89) that at the meeting of the men on February 6th, the night they formed their union, "The general opinion of the men were that they did not want Mr. Docs in our union for the simple reason we knew nothing would be secret from there on out."

Heilman, the union organizer, a witness for respondent, testified that on the night of February 6th he as the union representative was asked—

> "What they should do about the other men in the plant about whom they weren't too sure, and I told them that from now on it would be impossible to keep the thing quiet, anyhow, and they might as well go after everybody, and somebody—this was the first meeting I had with them, and I did not know the names of many of them—and somebody said 'Even Steve Docs, that stool pigeon?'
>
> And I said, 'I don't care. Go after all of them'; and apparently they followed my advice and did it." (R. 185, 196.)

Why this testimony of Yingling, Thomas and Heilman is "not credible, detailed evidence in support of such testimony," to conceal their organizational efforts from petitioner is hard to determine. Certainly there is no place in the record any direct evidence of the fact that petitioner had any knowledge of such activities and there is the direct testimony of both McCormick and Burger that they did not know of any such activities until February 9, 1943, the day after the discharge of Yingling and Thomas.

The fact that on Sunday morning, February 7th, the day preceding the discharges, one of the employees told Docs, who acted as foreman of the maintenance crew in the absence of the regular foreman, that Yingling and Thomas had been elected officers in the Union the night before and that Docs had ample opportunity to convey this information to McCormick before the discharges on the afternoon of February 8th is certainly not evidence of the fact that on February 8th McCormick knew of the union activities of Yingling and Thomas. Docs had no more opportunity to convey this information to McCormick than any other employee who knew of the organizational activities. The fact that Docs acted as a foreman in the absence of his regular foreman can certainly make no difference. Docs was not acting as a foreman on Sunday, February 7th, or Monday, February 8th, for his own foreman, Ernest Berger, was working both days. (R. 116, 221.) The fact that the respondent found that Docs had "ample opportunity to convey this information to McCormick before the discharges on the afternoon of February 8th" shows that respondent relied heavily upon the hearsay testimony that Docs was a tale bearer, and did not in fact disregard the alleged statements of Harry Nelson to Thomas, but utterly disregarded Nelson's denial that any such conversation ever took place. It is clear from the decision and order of the respondent that from the circumstances enumerated by it in its order and decision (R. 377, 378) it inferred, first,

that McCormick or petitioner learned of the union activities and the election of Thomas and Yingling as officers in the union, and then based upon this inference further inferred that because thereof Thomas and Yingling were discharged.

Certainly such an inference upon an inference is not substantial evidence. More certainly such an inference upon an inference cannot control over the positive direct testimony—

*First*: Of the respondent's witnesses themselves that union organization and activities were secretly conducted.

*Second:* The positive denial by Does that he informed McCormick about this incident in question or any other incident at any other time.

*Third:* The positive testimony of McCormick that he discharged Thomas and Yingling for what he at least considered good cause, that he did not discharge them because of their union activity; that he in fact knew nothing of any union activity when he discharged them, and that he first learned of such activity on the day following their discharge.

*Fourth:* The direct positive testimony of E. J. Burger, Vice President and Lorain Division Manager, that he knew nothing of the union activities until the day after the discharges, when he received a telegram from respondent advising him of the filing of the charges.

True the respondent in its decision and order found that it did not credit this positive direct testimony of Does, McCormick and Burger, but respondent pointed to nothing in the record which substantiates its bland statement in this regard. Is an administrative body to be permitted arbitrarily to discredit witnesses and place its final finding upon presumption or inference which in turn is based upon presumption or inference?

In *United States v. Ross* (1875), 92 U. S. 281, this Court at page 283 said:

> "Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after Aug. 19 does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed to have reached Chattanooga, thus arrived, and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain."

In *National Labor Relations Board v. Citizens News Company* (C. C. A. 9th, 1943), 134 F. 2d 970, where the employer knew of the union activities of its employees, the Court said, pages 973 and 974:

> "In considering this question it should be emphasized that the right to terminate a contract of employment is a constitutional right of the utmost importance. The mere discharge of an employee with or without reason is therefore not evidence of intent to affect labor unions or the rights of employees under the National Labor Relations Act. That there must be more than mere discharge is clearly recognized by the Board in its findings concerning the discharge of Lugoff. We merely quoted the conclusions at which the

Board arrived. The conclusion is preceded by a discussion of the evidence and an argument based thereon occupies thirteen pages of the findings. The argument contained in the findings is based upon the proposition that Lugoff, shortly before his discharge, circulated a petition for the inclusion in the Guild of employees in the classified advertising department. It should be stated that no other employee was discharged because of the petition although it was prepared by another employee who was very active in the union. We find no substantial evidence of discrimination in the discharge of Lugoff. Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently substantial to support a finding.

"The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence."

In *Alexander v. Standard Accident Insurance Company* (C. C. A. 10th, 1941), 122 F. 2d 995, at 997, the Court said:

"Appellant offers no positive, direct evidence that either written or oral notice was given by the Company to either the general agent or to Standard. Can it be said that the evidence that an adjustor who was an employee of the General Agent appeared and made inquiry concerning the accident is such that from it a jury might reasonably conclude, according to reason and the common experience of men, that the company did give notice? If it can, the court was in error in directing a verdict for Standard. If not, the ruling of the court was right, because the competency of circumstantial evidence offered to establish an ultimate fact, that is, whether the circumstances may reasonably tend to prove the ultimate fact, is a question of law in the first instance, to be decided by the court. *United States Fidelity & Guaranty Co. v. Des Moines Natl. Bank,* 8 Cir., 145 F. 273, 279; *Payne v. Blevins,* 4 Cir.,

280 F. 310; *C. M. & St. Paul Ry. Co. v. Coogan*, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041. If the inference may be drawn from these circumstances that the Company gave notice, then the question arises: To whom was it given?—to the agent or to Standard? If the notice was to the agent, was it oral or written? The policy provided for written notice and the agent had no authority to waive the provisions of the policy requiring written notice. All of these questions must be answered before it can be said that the Company gave notice to Standard. A proper answer to them cannot be reasonably inferred from the sole circumstance that an adjustor for the agent appeared and made some inquiry concerning the accident. The court rightly held that appellant failed to prove notice.

"The mere choice of probabilities does not constitute evidence and will not be submitted to the jury. Nor does the placing of inference on inference or presumption on presumption constitute a sufficient basis for the determination of facts. *United States v. Ross*, 92 U. S. 281, 283, 23 L. Ed. 707; *Pennsylvania R. R. Co. v. Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; *Parker v. Gulf Refining Co.*, 6 Cir., 80 F. 2d 795; *The Cabo Hatteras*, D. C., 5 F. Supp. 725."

See also:

*Ballston-Stillwater Knitting Company v. National Labor Relations Board*, (C. C. A. 2nd, 1938) 98 F. 2d. 758, 762 and 763;

*Appalachian Electric Power Company v. National Labor Relations Board* (C. C. A. 4th, 1938) 93 F. 2d. 985, 989.

## CONCLUSION.

It is respectfully submitted that:

1. The statements of McCormick to Thomas and of Burger to a group of employees were not as a matter of law violative of Sections 7 and 8 of the National Labor Relations Act.

2. Petitioner cannot be held accountable for the personal opinion of McCormick expressed to Yingling.

3. The findings that Thomas and Yingling were not discharged for cause but were discharged for their union activities are contrary to law in that such findings were reached by drawing an inference in turn based upon an inference, are not supported by any substantial evidence and are contrary to the only direct evidence submitted.

Respectfully submitted,

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